Doreen Johnklass @ Bebby v Guan @ Franklin Guang ak Juma

HIGH COURT (SRI AMAN) — SUIT NO S/SG 2 OF 1993/II
LAU BEE LAN J
12 DECEMBER 2006

Evidence — Witness — Failure to call witness — Statutory Declaration by the deceased mother — Second class magistrate executed thumb print and attested to it — Ownership of land highly disputed by parties — Whether fatal to plaintiff's case in not calling the second class magistrate

Limitation — Adverse possession — Time, running of — Action against stepsister — Land allegedly transferred in 1975 to defendant illegally — When time starts to run — Whether statute barred — Limitation Ordinance (Sarawak Cap 49) Schedule item 112

The plaintiff instituted an action against her stepsister the defendant, where the plaintiff alleged that the transfer in 1975 of land to the defendant by their late mother (Randu) was done illegally. The plaintiff contended that the land was purchased from the money and interest earned from a fixed deposit under the bequest by the plaintiff's late father. The defendant contended that the land was bought from money earned by Randu and her late father. The issues to be tried agreed between the parties were: (i) whether the plaintiff had beneficial interest on the said land? (ii) Whether the purported transfer by the defendant was illegal and void? The learned counsel for the defendant, challenged the admissibility of a statutory declaration by Randu confessing that the land was meant for the plaintiff as it was purchased with the plaintiff's money and a second class magistrate executed the thumb print and attested to it himself but was not called as a witness. The defendant also pleaded the defence of limitation and relied on item 112 of the Schedule to the Limitation Ordinance (Sarawak Cap 49) ('the Ordinance').

Held, dismissing plaintiff's claims with costs to be taxed:

(1) The issue of whether the contents of the statutory declaration was explained to the late Randu only went to the weight of the evidence rather than its admissibility. As the ownership of the land was highly disputed by the parties, it was critical and essential for the second class magistrate to be called as a witness to testify to the fact that indeed that the statutory declaration was explained to the late Randu and she understood the contents thereof. Based on the evidence, on the balance of probabilities, the plaintiff did not have a beneficial interest in the land (see para 18–19 & 22).

(2) Item 112 of the Schedule to the Ordinance states that *for possession of immovable property or any interest therein not hereby otherwise specially provided for*, the period of limitation is twelve years and the period starts to run from the time when the possession of the defendant becomes adverse to the plaintiff. Based on the evidence time started to run from 24 June 1975 which meant that up to the institution of the proceedings by the plaintiff on 22 February 1993, a period of eighteen years had lapsed. Even if in fact the plaintiff had knowledge of the transfer of the said land only in 1978, up to the time of institution of the action by the plaintiff on 22 February 1993, a period of fifteen years would have lapsed. Therefore, in both instances, the action of the plaintiff was statute barred (see para 40).

[Bahasa Malaysia summary

Plaintif memulakan satu tindakan terhadap defendan, adik tirinya, di mana plaintif mendakwa bahawa pemindahan sebidang tanah pada tahun 1975 kepada defendan oleh ibu mendiang mereka (Randu) telah dibuat secara menyalahi undang-undang. Plaintif menyatakan bahawa tanah tersebut telah dibeli dengan wang dan faedah yang diperolehi daripada simpanan tetap daripada pusaka mendiang ayah plaintif. Defendan menyatakan bahawa tanah tersebut dibeli daripada pendapatan Randu dan mendiang ayahnya. Isu yang diperbicarakan seperti yang dipersetujui pihak-pihak ialah: (i) Sama ada plaintif mempunyai kepentingan benefisiari atas tanah tersebut? (ii) Sama ada pemindahan yang dikatakan itu oleh defendan adalah menyalahi undang-undang dan terbatal? Peguamcara defendan yang bijaksana mencabar kebolehterimaan satu akuan berkanun oleh Randu bahawa tanah tersebut adalah untuk plaintif oleh kerana ia dibeli dengan menggunakan wang plaintif dan di mana seorang majistret kelas kedua menyempurnakan ibu jari dan mengakusaksinya sendiri tetapi tidak dipanggil sebagai seorang saksi. Defendan juga memplidkan pembelaan had masa dan bergantung pada perkara 112 Jadual kepada Ordinan Had Masa (Sarawak Cap 49) ('Ordinan tersebut').

Diputuskan, menolak tuntutan plaintif dengan kos untuk ditaksirkan:

(1) Isu sama ada kandungan akuan berkanun diterangkan kepada mendiang Randu hanya mempengaruhi beratnya keterangan tersebut dan bukan kebolehterimaannya. Oleh kerana pemilikan tanah tersebut dipertikaikan sekeras-kerasnya oleh kedua-dua pihak, ia adalah penting dan perlu untuk majistret kelas kedua dipanggil sebagai seorang saksi untuk memberi keterangan kepada fakta bahawa satu akuan berkanun telah diterangkan kepada mendiang Randu dan beliau memahami kandungan tersebut. Berdasarkan keterangan, atas imbangan kebarangkalian, plaintif tidak mempunyai satu kepentingan benefisial atas harta tanah tersebut (lihat perenggan 18–19 & 22).

(2) Perkara 112 Jadual kepada Ordinan menyatakan *for possession of immovable property or any interest therein not hereby otherwise specially provided for*, had masa adalah 12 tahun dan jangkamasa bermula dari tarikh apabila pemilikan oleh defendan menjadi bertentangan terhadap plaintif. Berdasarkan

keterangan, masa mula berjalan dari 24 Jun 1975 bermaksud sehingga permulaan prosiding oleh plaintif pada 22 Februari 1993, satu jangkamasa lapan belas tahun telahpun luput. Walaupun pada faktanya plaintif mempunyai pengetahuan pemindahan tanah tersebut hanya pada tahun 1978, sehingga masa untuk memulakan tindakan oleh plaintif pada 22 Februari 1993, satu jangkamasa lima belas tahun telahpun luput. Dengan itu, dalam kedua-dua keadaan, tindakan plaintif telah luput had masa (lihat perenggan 40).]

Notes

For cases on failure to call witness, see 7(1) *Mallal's Digest* (4 th Ed, 2001 Reissue) paras 2589–2592.

For cases on adverse possession generally, see 9 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1984–1998

Cases referred to

Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45 (refd)

Bank of Tokyo-Mitsubishi (Malaysia) Bhd v Sim Lim Holdngs Bhd & Ors [2001] 2 CLJ 474 (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1 (refd)

Sa'adi bin Ibrahim & Anor v Liew Han Sin & Anor [2006] 6 CLJ 111 (Supp) (refd)

Sok-Chun Tang v Vincent Tang Fook Lam & Anor [1999] 2 MLJ 274 (refd)

Legislation referred to

Evidence Act 1950 s 73A (1), 114(g), (e)

Limitation Act 1953 s 22(1)(b)

Limitation Ordinance (Sarawak Cap 49) item 112, s 9

Fabian Sigar (John Shek, Sigar, Wei Yee & Co) for the plaintiff.

Frederick Sabungkok Jamit (Jayadi & Co) for the defendant.

Lau Bee Lan J:

[1] This is an action instituted by the plaintiff, Doreen Johnklass @ Bebby against the defendant, Catherine Jerandai Ak Tuah (now deceased and replaced by Guan @ Franklin Guang ak. Juma for a declaration that:

(i) the purported transfer in 1975 vide land instrument No 682/1975 of the said land (see agreed facts hereafter) to the defendant by the said mother, late Randu (f) ak Impin @ Randuk ak Empin be invalid and void;

(ii) the said land be retransferred to the plaintiff and accordingly the plaintiff to be registered as owner thereof in the Land Registry, Land and Survey Department, Sri Aman;

(iii) in the alternative, the said purported transfer made the defendant (the transferee) be the trustee for the plaintiff who at all material time was the beneficial owner of the said land;

(iv) the dwelling house on the said land erected by the defendant or under her instruction to be the property of the plaintiff, and/or;

(v) the defendant do pay $50,000 to the plaintiff in damages as the defendant had for 17 years derived rental income from the said land unlawfully;

(vi) the chattels of the plaintiff's late father comprised of glass-ware, silver-ware, stamps, coins and papers and antique swords which are kept by the defendant to be released to the plaintiff;

(vii) any other relief the honourable court may consider fair and equitable; and

(viii) costs.

[2] The agreed facts of the case are —

(1) The plaintiff is the natural daughter of the late Randu ak Impi @ Randuk ak Empin ('mother') with the late Walter Osmond Johnklass ('plaintiff's father') and was born in 1941.

(2) The defendant is the step-sister of the plaintiff born of the said mother with Encik Tuah ak Tunchon of Rumah Tanjung Bijat, Sri Aman who is still alive and living in Sri Aman.

(3) Sometime in 1957, the plaintiff married one En Baba Rumpang in accordance with Iban Adat whereas the defendant married Franklin Guang sometime in 1970 also in accordance with Iban Adat.

(4) The plaintiff's late father died in Batu Lintang Internment Kuching before the Japanese surrender and left a will which bequeath $6,000 to the plaintiff.

(5) Sometime on 7 March 1949 the said mother bought a parcel of land described as Lot 161 Block 3 Simanggang Land District ('Land').

(6) The bequeath of $6,000 was administered by the then Registrar of Supreme Court Sarawak in Kuching until the plaintiff attained 21 years of age.

(7) On the 11 February 1993, the said mother was sick and bedridden at Kuching General Hospital.

[3] The disputed facts are:

(1) The said mother from her sick bed at Kuching General Hospital on the 11 February, 1993 made a confession to say that the purported transfer of the parcel of land described as Lot 161 Block 3 Simanggang Town District ('land') which the defendant averts was done legally on the 24 June 1975, was meant for the plaintiff as it was purchased with the plaintiff's money.

(2) The purported transfer of the said land to the defendant was done illegally by the defendant's husband who was at that material time employed at the Simanggang Lands & Surveys Department and the purported thumb print of the said mother was taken and printed on a piece of paper without the purpose explained to the said mother.

(3) As a result of the illegal transfer of the said land, the defendant had on the 19 December 1977 obtained a loan from a finance company, Kong Ming Finance Company and charged the said land vide land instrument No L 1682/1977.

(4) By the purported transfer the defendant made a wrongful gain from the said Land which from its purchase had never been hers nor her interest and it had deprived the plaintiff thereby causing the plaintiff to suffer great loss.

[4] The issues to be tried agreed between the parties are:

(1) Whether the plaintiff has beneficial interest on the said land?

(2) Whether the purported transfer by the defendant was illegal and void?

WHETHER THE PLAINTIFF HAS BENEFICIAL INTEREST ON THE SAID LAND

[5] Basically, the contention of the plaintiff is that the said Land was purchased from the money and interest earned from a fixed deposit left under bequest by the plaintiff's late father, Walter Osmond Johnklass for the plaintiff and her late mother, Randu ak. Impin @ Randuk ak Empin until the plaintiff reached adulthood (21 years old); whereas this was disputed by the defendant, Catherine Jerandai Ak Tuah, who passed away on 24 October 2004 after the action was filed by the plaintiff and is now substituted by Guan @ Franklin Guang ak. Juma, her husband. The contention of the defendant is that the land was brought from money earned by her late mother, Randu ak. Impin and her late father, Tuah ak Tunchon whom the former married after the death of her late husband, Walter Osmond Johnklass.

[6] To prove that the plaintiff has a beneficial interest in the land, the plaintiff relied on the statutory declaration made by Randu on 11 February 1993 (ID P1), the testimonies of the plaintiff (PW3), Dr Sim Siew Meng (PW1), Baba ak Rumpang (PW2) and Patrick ak Uren (PW4), her own statutory declaration made on 12 February 1993 (exh P8), the will dated 20 November 1994 (exh P3(b) and (c) (at plaintiff's supplementary bundle of documents (encl 124), pp 11–12), the codicil to the will dated 21 January 1949 (exh P3(a) at encl 124, p 10, the application of the late Randu to the Chief Justice of Sarawak dated 25 February 1947 (encl 124) at p 8 and also the receipt by plaintiff dated 25 August 1964 (exh P4) at encl 124, p 9. In examination-in-chief, given by way of witness statement ('WSPW3'), the plaintiff stated that sometime in 1949, she had followed her late mother to Sri Aman (then Simanggang) to collect her money, which was kept in trust on her behalf by the then Registrar of the Supreme Court at Kuching. At that time, her late mother was given notice from the Lands & Surveys Sri Aman to purchase a piece of land at Sri Aman which was the Land in dispute.

[7] According to the plaintiff, her late mother told her that the said land was bought for her from the money left by her late father and her late mother was instructed by the then Registrar of the Supreme Court, Kuching, the late Mr Tan Yam Thong to purchase the Land for her use when she reached adulthood.

Further, according to the plaintiff, the money used by her late mother to purchase the said Land was from interest earned from the money kept in trust by the then Registrar Supreme Court, Kuching, on her behalf.

[8] In cross-examination, PW3 was posed the following question:

Q: Refer to para 5 of WSPW3 and exh P3(a) (codicil) and exh P3(b) and (c) (will). Was there anything stated in the codicil or the will by your late father that the proceeds from the will must be used to buy land in Sri Aman?

A: It was not stated in the will that the proceeds from the will must be used to buy land in Sri Aman. However, my mother withdraw the interest from the said sum of RM6,000 to buy a parcel of the land at Sri Aman for us to stay.

Q: Who is the 'us'?

A: 'Us' refer to me.

Put: Alleged interest from the will was never used to purchase the land but was solely used for your maintenance. Do you agree?

A: I do not agree.

Put: The purchase of the land in 1949 was made pursuant to using the money from the income of your late stepfather, Tuah ak Tunchon and your late mother? Do you agree?

A: I do not agree.

(NOP/24 lines 9 – 23)

[9] From the evidence, PW3 disagreed that the withdrawal of the interest from the will was purely for her maintenance but said that it was also used to buy the said land in dispute but however agreed that there was nothing stated in the will that the proceeds from the will must be used to buy the said land; she also disagreed with the defendant's version that the said land was purchased from the income of her late stepfather, Tuah ak Tunchon and her late mother.

[10] I observe that in the will, it is stated, inter alia:

> To Randu, Dayak woman of Bijat, Simanggang I leave ($2,000) two thousand dollars free of duty and all my goods and chattels in her possession at my death excluding my private papers, stamp album, spare stamps and box or boxes containing the same. To my Executor and Trustee I leave six thousand ($6,000) free of duty in trust for the benefit of the child of the aforesaid Randu and myself, the income to be paid to or otherwise expended for the benefit of such child until she attains the age of twenty one years when the capital sum shall be paid to her absolutely.

[11] I find that in the codicil to the will there is no mention of any money due to the plaintiff. In the application by the plaintiff's late mother to the Chief Justice of Sarawak, it is stated in paragraph 2, inter alia:

> That the deceased died testate and his last will and testament dated 12 November 1944, he bequeathed, inter alia, the sum of Six thousand dollars ($6,000) free from Supreme Court

of Sarawak, in trust for the benefit of the said minor, Bibi. The income derived therefrom to be paid to or otherwise expended for the benefit of the said minor until she attains the age of twenty-one years when the capital sum shall be paid to her absolutely.

[12] In the said application, the late Randu stated that she and her daughter, the plaintiff had no house of their own and intended to purchase one where they could stay (para 4). Further, it is to be noted that in the same paragraph, it is stated that the late Randu applied for permission from the Court to authorise the Registrar of the Supreme Court of Sarawak as executor and trustee of the will to utilise and pay out from the capital sum of $6,000 for purchase of landed property at the price $5,700. It is significant to note that the land property itemised were —

(a) all that piece of land at Batu Lintang Road, comprising 3A-3R-11P hold under Kuching Grant Serial No 1141.

(b) all that piece of land at Batu Lintang Road, comprising 0.66 acre, held under Kuching Occupation Ticket No 12486.

(c) all that piece of land at Batu Lintang Road, comprising 3.87 acres, held under Kuching Occupation Ticket No 16684.

[13] There is no evidence adduced by the plaintiff as to whether there was any approval of the late Randu's said application. However, there is a receipt from the plaintiff that she acknowledged receiving $6,696.00 being monies held in trust for her by the Registrar of the High Court in Borneo under the terms of her late father's will and such acknowledgement discharged the Registrar and his predecessors in office from all obligations and liabilities towards her under the said will. The learned counsel for the plaintiff submitted although the will did not specify that the land in dispute was bought using money in the will, he had invited the court to make a presumption based on the evidence of PW2, PW3 and PW4. On the other hand the learned counsel for the defendant submitted that the plaintiff had failed to establish a direct link between the will and the land in dispute. I am incline to agree with the learned counsel for the defendant because the will and the codicil to the will are contemporaneous documents and as I had alluded to earlier there is nothing whatsoever written therein to show that the contention of the plaintiff is true. In addition, I find that the learned counsel for the defendant was correct in submitting that even the application by the late Randu to the Chief Justice of Sarawak which was the only document which touched on land however showed the intention of the late Randu to purchase three pieces of land in Kuching and not in Simanggang and for that matter as I have pointed out earlier there is no evidence whether the approval to undertake the purchase of the lands was successful.

[14] The learned counsel for the defendant, challenged the admissibility of the statutory declaration of the late Randu (IDP1) basically on the grounds (i) because of the dubious manner in which it was obtained in that the late Randu was very sick and PW1 agreed that a patient like the late Randu would suffer mental disability even though it was a brief one; (ii) that it is highly improbable that PW1 would have make such a certification because PW4 stated that the doctor who certified the condition of the late Randu was a specialist at the material time whereas PW1 was not; (iii) whether the contents of the statutory declaration was explained to the late Randu

remained unanswered. This calls for the examination of the relevant evidence. In examination-in-chief, PW3 testified that she went to Sri Aman together with her husband and son-in-law, Paul Murphy Ningkan to bring her late mother to Kuching to seek treatment at Sarawak General Hospital (SGH). According to her, her late mother told her to take legal action to get the land from the defendant and that the defendant and her husband had purportedly taken her thumb print without telling her the intention to do so. She then approached PW4, Mr. Patrick ak Uren to see her mother who was quite weak and sick at the SGH to prepare her statutory declaration.

[15] PW4 confirmed that he prepared the statutory declaration upon the instruction of the plaintiff and explained that he was first retained by PW2, plaintiff's husband, Baba Rumpang when he then went to the National Archives to ascertain the stories which was related to him concerning the plaintiff's late father. There was a break after which it was brought to his notice that the late Randu was admitted to SGH and he was brought to see her. PW4 further testified:

> She was lying in bed in the General Hospital Kuching. I interviewed her and I checked with the doctor who was in the ward whether she was fit enough to understand what she was talking about and the doctor said that she could.
>
> So I spoke to her in Iban. Bebby, her daughter was there, Baba Rumpang was there, the doctor in the ward was beside her bed. I asked her whether her husband was Mr Johnklass a prisoner of war (POW) and she said 'Yes' with tears flowing from her eyes (and there are tears in my eyes now) and it was a sad moment. She was holding the hand of Bebby and I also asked her if she did received any money from her husband or from her husband's estate after the war and she said she did. She said very clearly that she was paid initially a lump sum of money of a few thousand and over and above that there was a monthly remittance in the sum of $150 for the upkeep of her daughter and herself. She told me that she had herself got married to another man to help her over the difficult years during the war. And when she began to receive the monthly remittance, she knew it was meant for the upkeep of her daughter with Mr. Johnklass. She also told me and those around her bed that her then husband (new) advised her to save some of the money and buy land with it which she did. She said the money did not last forever. The money ended after a few years after the war but by that time Bebby herself had got married and she continued to stay with her daughter by her new husband. She said that by the time she got sick she was staying by her daughter with her new husband and that she was staying in a house built on the land that she bought as I just indicated.
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> After that interview in the Hospital, I went back to my office and prepared the Statutory Declaration and I went to the District Office Kuching and I was familiar with this guy who was related to me and he was a 2nd class Magistrate. He agreed to come and I brought him over to the Hospital that very afternoon.
>
> This Magistrate arriving at the Hospital and to the bedside of the wife of Mr Johnklass, he introduced himself and asked those questions on the subject which were covered in the statutory declaration. I was not standing next to him but I watched from a distance of 10 feet away, so was Mr Baba Rumpang, as well as Bebby.
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> Mrs Johnklass spoke very well in Iban and so did the Magistrate. After satisfying himself, this Magistrate himself executed the thumb print and attested to it himself. This Magistrate was not paid, we did not pay him a single cent because he was a government officer.

He executed his duty as a Government servant. That is the answer as to how the statutory declaration was made in a very long sentence.

Q: Is the second class Magistrate around?

A: I do not know his whereabouts; I understand that he has recently retired from the government service and presumably he maybe in his own village in Serian District.

(NOP/39 line 14 up to page 41 line 7)

[16] PW4 testified that he had ensured that the late Randu was in the capacity to make the statutory declaration. PW4 said that he went to the SGH twice, first in the morning for the interview of the late Randu where he met a doctor there and thereafter in the afternoon after he had gone back to his office to prepare IDP1 and returned to the SGH with the Second Class Magistrate whom he requested to explain the contents of the IDP1 to the late Randu and there was another doctor present who was a specialist. In answer to a question from the court, as to who was the doctor who was present on the two occasions, PW4 answered that the morning doctor was a doctor in the ward and the second doctor was the one who introduced himself as a specialist to him. When asked further by the court what he had to say to the evidence of PW1 that he was not a specialist in any field, PW4 replied, *I took what I was told by the doctor* (NOP/43 line 23) and he believed that PW1 was the doctor who made the notation on IDP1. There is the evidence from PW1, Dr Sim Siew Meng that he was the doctor who was asked to assess whether the late Randu was competent to make a declaration and he saw her during the lunch break sitting on the bed, conscious and orientated; and he assessed her to be competent to make a declaration. According to him, there was a magistrate and a lawyer with the late Randu at that time. PW1 confirmed the certification and the initial which he made on the right hand side middle portion of IDP1 at p 13 which reads, *In my opinion, the above patient is competent in making a declaration.*

[17] Having examined the evidence of PW1 and PW4, there is no doubt that the late Randu was competent to make the statutory declaration (IDP1). I agree with the learned counsel for the plaintiff, Mr Fabian Sigar that the slight discrepancy regarding whether PW1 was a specialist is immaterial and not fatal to the case in the light of the direct evidence from him that he was the doctor who did the certification. Although PW1 said that the probability of septicaemic shock can cause an unstable mind and usually the septicaemic shock is of a short duration before the patient passed away which was admitted by Mr Federick Sebangkok, it is to remembered that PW1 stated that he was not sure that he was the doctor in attendance for the late Randu unless he saw the case note and he assumed that the late Randu suffered from septicaemic shock and pneumonia Notwithstanding the fact that the late Randu passed away the next day after making the statutory declaration ie, on 12 February 1993, it is to be noted that it was not asked by the learned counsel for the defendant, what the doctor meant by *short duration before the patient passed away.* Therefore, it is questionable whether the late Randu was mentally unstable at the material time. Hence, I cannot accept the argument of the learned counsel for the defendant that the late Randu was unstable when there is the evidence from PW1 himself who confirmed that the late Randu was competent to make the declaration.

[18] The learned counsel for the defendant submitted that the court ought to invoke s 114(g) of the Evidence Act 1950 (Act 56) ('Evidence Act') against the plaintiff for failure to call the Second Class Magistrate as a witness on the ground that the plaintiff could not assume that the said magistrate had read and explained the said statutory declaration to the late Randu as there was nothing to suggest that he had done so. Learned counsel for the plaintiff responded that no adverse inference should be drawn as it is not fatal to the plaintiff's case because the said magistrate would have been an interested witness and there was the corroborative evidence of PW1, PW2, PW3 and PW4 that IDP1 was properly executed and cited the case of Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1. In my view, the issue of whether the contents of the statutory declaration was explained to the late Randu only goes to the weight of the evidence rather than its admissibility. In cross-examination, PW4, stated that he could not recall the name of the Second Class Magistrate but he was familiar with him; can identify him and he knew him as he was at one time the private secretary of Datuk Jacob Ridu who was the Assistant Minister of Works; and he was always present at the meeting held at the residence of either Datuk Jacob Ridu or at PW4's residence. In cross-examination, PW4 when asked who explained the contents of the statutory declaration to the late Randu, stated that it was the said magistrate who read it to her and checked if she understood it. It is true that PW4 stated in cross-examination and in re-examination that he stood about 10 feet away from where the magistrate was (he was at the bedside of the late Randu) together with the plaintiff and PW2; and he said that the late Randu spoke very well in Iban and so did the magistrate and he could clearly see the magistrate executing the late Randu's thumb print after satisfying himself and attesting the statutory declaration thereafter. PW3 in examination-in-chief had stated that the statutory declaration was read and explained to the late Randu by PW4 in the presence of the Magistrate, PW1, PW2, her younger brother and herself. However, when queried by the court as to what PW3 said, PW4 stated that:

> *The magistrate upon my asking of him did the reading and explanation* but I was there, Bebby was there, Baba Rumpang was there and a doctor who was a specialist whom I heard has migrated to Australia was there. *I did not explain this document because I had already explained to her in the morning.* (NOP/43 lines 10–14) (Emphasis added)

and thereafter she put her thumb print on it. It was prudent of PW4 to get the magistrate to explain the contents of the statutory declaration to the late Randu because he was the one who had prepared the statutory declaration. It is to be noted that just above the right thumb print of the late Randu, are written the following words:

> My thump (sic) print is hereby printed hereunder after all the above statement has been explained to me in Bahasa Iban and they are true.

[19] Then above the round chop of the Second Class Magistrate Kuching, there are the words *Declared before me,* followed by an *initial* and a date *11/2/93* which presumably must have been initialled and written by the Second Class Magistrate. Bearing in mind that this is a case where ownership of the Land is highly disputed by the parties, in my view, it is critical and essential for the Second Class Magistrate to be called as a witness to testify to the fact that indeed that the statutory declaration

was explained to the late Randu and she understood the contents thereof in particular the purport of para 10 of the statutory declaration.

[20] Section 73A(1) of the Evidence Act 1950 states (the relevant part):

> Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:
>
> (a) if the maker of the statement either —
>
> (i) had personal knowledge of the matters dealt with by the statement; or
>
> (ii) …; and
>
> (b) if the maker of the statement is called as a witness in the proceedings:
>
> Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, …

[21] There is no dispute that the plaintiff's mother had passed away on 12 February 1993 as evident by her Medical Certificate of Cause of Death (exh P5). During the proceeding, the original copy of IDP1 was not produced. On 12 December 2006, I had called for the production of the original copy of IDP1 (through the court interpreter) but was informed by the learned counsel for the plaintiff that it was not available as the case was taken over from the former counsel, Mr Patrick ak Uren. Be that as it may, Mr Patrick ak Uren was called as a witness and he confirmed that the statutory declaration was prepared by him. Therefore, I rule that IDP1 is admissible as evidence by virtue of s 73A(1)(a)(i) of the Evidence Act 1950 and its proviso thereof. The only issue to my mind is how much weight is to be attached to the contents stated therein as I have adverted to before.

[22] Based on the evidence above, on the balance of probabilities, I find that the plaintiff does not have a beneficial interest on the Land.

WHETHER THE PURPORTED TRANSFER BY THE DEFENDANT WAS ILLEGAL AND VOID

[23] The defendant attempted to support their case by urging the court to admit the affidavit of the late Tuah ak Tunchon affirmed on 8 June 1993 (IDD1) (at pp 14 to 17 of Disputed Bundle of Documents) by invoking s 73A(2) of the Evidence Act and citing the case of *Bank of Tokyo-Mitsubishi (Malaysia) Bhd v Sim Lim Holdngs Bhd & Ors* [2001] 2 CLJ 474 on the ground that it was held, inter alia:

> … although the documents were marked as 'ID', it did not stop the court from deciding on their admissibility. Section 73A(2) of the Evidence Act 1950 empowers the Court to do so at any stage of the proceedings having regards to all the circumstances of the case.

[24] Learned counsel for the plaintiff submitted that IDD1 has no bearing at all in the case and the case of *Bank of Tokyo-Mitsubishi (Malaysia) Bhd* can be distinguished

as it concerns the service of documents whereas in this case, the credibility of IDD1 was at stake and therefore it cannot be admissible under s 73A(2) of the Evidence Act 1950. It is true that the Court during the proceedings had made the observation:

> Late Tuah ak Tunchon is not before the court as he has passed away. No evidence before the court as to whether he is a literate person as the court is only aware that he planted padi seasonally, other than that he is unemployed. (NOP/48 lines 18–20).

[25] However, it was pointed out by the learned counsel for the defendant that according to PW2 in re-examination, Tuah ak Tuchon was a police constable at 10 Miles Police Station Kuching at the time of his marriage to the late Randu. (NOP/16 lines 13–16). [I wish to make a notation here that in the comment by learned counsel for the defendant which appears at p 49 line 2, the words 'Tuah ak Tunchon' which should appear after the words 'Baba ak Rumpang,' was inadvertently left out]. In the course of the proceedings, the original copy of IDD1 was not produced by the defendant; however on 12 December 2006 upon request by the court, the said original copy was submitted to the court by the learned counsel for the defendant. It is also not disputed that Tuah ak Tunchon is now deceased. In this regard, I am of the view that the conditions under s 73A (1)(a)(i) of the Evidence Act 1950 and its proviso thereof has been complied with and I rule that IDD1 is admissible evidence. Hence, s 73A(2) of the Evidence Act 1950 and the case of *Bank of Tokyo-Mitsubishi (Malaysia) Bhd* is not applicable. Similarly in respect of IDD1 which I have now ruled as admissible, the remaining issue is the weight to be attached to the contents thereof.

[26] The defendant had adduced evidence through DW1, Guan @ Franklin Guan ak. Juma, the husband of the late Catherine Jerandai ak Tuah, half sister of the plaintiff. DW1 testified in examination-in-chief that his late mother-in-law (the late Randu) told him and his late wife that the land was bought using hard earned money accumulated during her marriage to his late father-in-law, Tuah ak Tunchon and *for that reason, she told us to take good care of the land and instructed us to construct a new house to replace the old small house erected thereon.*

[27] The fact that there was an old house before on the land is confirmed by the evidence of PW2 who in cross-examination said that after the land was bought in 1949, the late *Randu ak Impin built the house and of course Tuah ak Tunchon was with her* (NOP/14 line 20) and in re-examination it was said that it was a wooden house (NOP/16 line 12). DW1 further said that his late wife and him informed the late Randu that they did not have much money to construct the new house; after some discussion everybody in the house including the late Randu and the late Tuah ak. Tunchon agreed to secure a bank loan to get some money to construct a new house; and for the purpose of getting the loan, the late Randu willingly and voluntarily allowed the ownership of the land to be transferred to his late wife's name. The late Randu together with the late Tuah ak. Tunchon and his late wife and himself went

to the Lands & Surveys Department, Sri Aman to do the transfer which was done by officers of the Lands & Surveys Department and witnessed by Denis Chong Wei Ling. DW1 stated that he was not involved in the preparation of the memorandum of transfer as the transfer was done by the registration section whereas he was attached to the survey section.

[28] DW1 further stated that his late wife managed to get a loan of RM10,000 from Kong Ming Finance Corporation Berhad sometime in December 1977 and they were able to construct a new wooden semi-detached house which still stands until today. I find that the evidence of DW1 was not shaken in cross-examination. In fact it was corroborated by the affidavit of the late Tuah ak Tunchon regarding the purchase of the Land for a sum of RM70 as premium to the Colonial Government using the hard earned money that the late Tuah accumulated with the late Randu; the construction of the new house and the need for a loan whereby the Land for the purpose of registration was sold for RM100 to the defendant in order to allow the Land to be used as collateral to secure the loan. I find that there is documentary evidence pertaining to the transfer of the land which is evident by the memorandum of transfer No L 682/1975 (exh P2) registered at Simanggang Land Registry Office on 24 June 1975. From exh P2 it can be clearly seen that the late Randu as the proprietor of the land had transferred the land in dispute to the late Catherine Jerandai for a consideration sum of RM100 and this transaction was done on 24 June 1975 whereby the late Randu thumb printed; the thumb print and the signature of the late Catherine Jerandai was witnessed by Denis Chong Wei Ling, Technical Assistant of the Land Registry Office Simanggang.

[29] In this regard, I am incline to believe the evidence of DW1, Franklin Guang that he did not influence, induce or exercise to compel the late Randu to sign the said transfer and therefore, I am of the view that the statement of the late Randu in paragraph 8.2 of her statutory declaration when she said that Franklin Guang had taken her left thumb and printed it on a piece of paper for a purpose and object which she did not know of is not credible. I find it difficult to believe what the late Randu declared in her statutory declaration that no money was ever paid to her as consideration for the transfer because on the certified document of title marked as 'T II' referred to in para 13 of the affidavit of the late Tuah ak Tunchon, there is an endorsement on the reverse side to the effect, *transferred to Catherine Jeramdai (f) anak Tuah (BIC K 231541) for $100 vide Instrument No L 682/1975 registered on 24 June 1975 at 10.45am* and there is an initial of an Asst Registrar beneath the endorsement. Based on s 114 (e) of the Evidence Act, the court can presume that the official act ie, the endorsement has been regularly performed. There is evidence that the new house was constructed as per the occupation certification marked as 'T IV' which was granted on 8 June 1978 to the late Catherine Jerandai (see para 13 of the affidavit of the late Tuah ak Tunchon).

[30] The plaintiff alleged that she only knew of the transfer of the land to the late Catherine Jerandai in 1992 while the learned counsel for the defendant had argued

that the plaintiff knew of the transfer of the land in 1975 or at the latest in 1978 as per her own statutory declaration. According to DW1, the plaintiff knew that the land was transferred to his late wife in 1975 as she was informed by the late Randu and his late wife about the transfer; and to which she (plaintiff) has no objection and in fact even told *my in laws and my late wife that the said land is your property and had nothing to do with her* (para 8 of WSDW1).

[31] DW1 also stated that the plaintiff also visited his family in Sri Aman after 1975 and the plaintiff and the husband came over in 1978; and in 1983 when the plaintiff's husband stood as an independent candidate in the Parliamentary Election at Sri Aman, the plaintiff and her husband stayed with them for quite sometime at their house as their house was converted into his office temporarily during the election. According to DW1, despite these numerous encounters, the plaintiff did not say that she was entitled to the Land and wanted to claim ownership thereof. The evidence of the visits made by the plaintiff and her husband was not challenged by the plaintiff. Further, it cannot be denied that the plaintiff made a statutory declaration (exh P3) on 12 February 1993, a day after her late mother's death and thereafter also instructed PW4 to lodge a caveat (exh P7) on the same date. In cross-examination regarding the transfer of the Land, the plaintiff said:

> My mother told me that in 1992, the said land was transferred but before 1992, my late mother told me that the land was still in her name. (NOP/24 lines 7–8).

[32] When referred to paragraph 6 of her Witness Statement (WSPW3) she agreed that her late mother told her in 1978 that the land was charged by her step-sister and also transferred to her. When referred to paragraph 7 of WSPW3 regarding the alleged conversation which took place in 1978 when she ranged her half sister, the late Catherine Jerandai, the plaintiff admitted the statement was correct. In re-examination, the plaintiff disagreed she first knew that the Land was transferred to the late Catherine Jerandai before 1992. I am of the view that what the plaintiff said in re-examination that she had no knowledge of the transfer before 1992 is not credible in the light of what she had admitted in cross-examination that she knew of the transfer of the Land in 1978 and also because of what the plaintiff stated in para 8 her statutory declaration (exh P8):

> *Sometime in 1978* my said mother then told me that the said land was charged by Catherine Jerandai (f) ak Tuah, my stepsister, … to a bank for a loan. (Emphasis added.)

[33] This statutory declaration was declared by the plaintiff on 12 February 1993. It is a contemporaneous document which is consistent with what the plaintiff said in cross-examination and therefore, I find it hard to believe that the plaintiff knew of the transfer only in 1992. In any event, even if the court does not accept the evidence of DW1 that the plaintiff knew of the transfer in 1975 (which I do not hold) it cannot be denied the date as to when the plaintiff knew of the transfer of the land to the late Catherine Jerandai would be 1978 at the latest, for the reason which I have alluded to earlier. It is indeed strange that if the plaintiff's claim as to the ownership is true,

why she did not do anything since 1978? Therefore, the allegation of fraud in this instant case, which I agree with the learned counsel for the defendant has to be proved beyond reasonable doubt based on the Federal Court case of *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45 cannot be sustained. Thus, I find that the transfer of the land by the defendant was not illegal and void.

[34] The defendant has pleaded the defence of limitation and relied on item 112 of the Schedule to the Limitation Ordinance (Sarawak Cap 49) ('Ordinance'). Learned counsel for the defendant submitted that the cause of action began to run from 24 June 1975 that is the date of the transfer of the land from the late Randu to the late Catherine Jerandai when the possession of the defendant becomes adverse to the plaintiff. Learned counsel for the plaintiff submitted that the cause of action accrued in 1992 when the plaintiff knew of the transfer of the land to the late Catherine Jerandai and not 24 June 1975. Instead learned counsel for the plaintiff submitted that the plaintiff's mother was holding the land in trust for the plaintiff and having that belief in her mind, made the plaintiff to initiate the legal action to get back the land from the late Catherine Jerandai after being requested by her late mother that the said land belonged to her was bought by the money bequeathed by her late father at that time. He further submitted that even if the transfer was made from the late Randu to the late Catherine Jerandai, the latter was to hold the land in trust for the plaintiff. To support his proposition, he cited the case of *Sok-Chun Tang v Vincent Tang Fook Lam & Anor* [1999] 2 MLJ 274, a case dealing with s 22(1)(b) of the Limitation Act 1953.

[35] It is an agreed fact that the marriage of the plaintiff to Baba Rumpang, PW2 sometime in 1957 [PW2 said he was married to the plaintiff on 23 May 1955] (NOP/14 line 7 and plaintiff said that she was married to PW2 sometime in 1955 – WSPW3 paragraph 4) and the marriage of the late Catherine Jerandai to Franklin Guang, DW1 sometime in 1970 was in accordance with Iban Adat. DW1 in examination-in-chief explained that the term 'nguai' in Iban Adat means:

> … a spouse shall follow the other and shall stay and live with the latter's family. In the present case, the plaintiff 'nguai' to the husband. The implication of 'nguai' is tht she will be given a 'pemai' either in term of movable property like jars, jewellery and even land and this (sic) items will be given to her out of discretion of the parent.

In para 8 of the affidavit of the late Tuah ak Tunchon (which I have ruled to be admissible), it is stated:

> During the marriage [of the plaintiff] an arrangement was made in accordance with the Iban Customs where she was to follow the Husband 'NGUAI' and with the arrangement she was given a 'PEMAI' to indicate that she is the daughter who is leaving the parents house to follow the husband and thereafter to join the Husband's family. This also will note that she will not have anymore say nor claims against the parent's property unless given to her out of goodwill.

[36] PW3 admitted in cross-examination that she *nguai (followed) her husband* and her husband was the breadwinner (NOP/23 line 24). So following the Iban Adat of

'nguai', it would mean that the plaintiff would have no claim to the said Land unless she can prove otherwise. From the evidence above, which I have discussed, it has been shown that the plaintiff has failed to adduce evidence that she has a beneficial interest in the Land.

[37] I find that the closest provision similar to s 22(1)(b) of the Limitation Act 1953 in the Ordinance is s 9 which provides:

> Notwithstanding anything contained in ss 3 to 8 inclusive, no suit against a person in whom property has become vested in trust for a specific purpose, or against his legal representatives or assigns, not being assigns from valuable consideration, for the purpose of following in his or their hands such property, shall be barred by any length of time.

[38] Essentially s 9 of the Ordinance provides that an action against a person in whom property is held in trust is not statue barred under the Ordinance. However, based on what I have discussed above, there is no evidence of the late Catherine Jerandai holding the said land in trust for the plaintiff and therefore, I find that there is no merit in the learned counsel for the plaintiff's submission on this point.

Sanjiva Row's the Limitation Act, 1963 Vol 2 (7th Ed, 1973) at p 551 states:

> In determining, whether a particular suit falls under any other Article, regard should be had to the substance of the claim rather than to the particular colouring given to it by the plaintiff.

Which I have the occasion to refer to in *Sa'adi bin Ibrahim & Anor v Liew Han Sin & Anor* [2006] 6 CLJ 111 (Supp) at p 122 paras g–h. Looking at the evidence adduced in this instant case and the reliefs sought for by the plaintiff, I am incline to agree with the learned counsel for the defendant that the plaintiff's claim is for possession of land. Therefore, the relevant item under the Ordinance would be item 112.

[39] Item 112 of the Schedule to the Ordinance states:

> For possession of immovable property or any interest therein not hereby otherwise specially provided for.

The period of limitation is twelve years and the period starts to run from the time when the possession of the defendant becomes adverse to the plaintiff. Based on the evidence which I have discussed above, I agree with the learned counsel for the defendant that in this action, times starts to run from 24 June 1975 which means that up to the institution of the proceedings by the plaintiff on 22 February 1993, a period of eighteen years has lapsed. Even if I am wrong in my aforesaid finding and in fact the plaintiff had knowledge of the transfer of the said land to the late Catherine Jerandai only in 1978, up to the time of institution of the action by the plaintiff on 22 February 1993, a period of fifteen years would has lapsed. Therefore, in both instances, I find that the action of the plaintiff is statute barred.

A **[40]** For the reasons which I have adumbrated above on a balance of probabilities, I find that the plaintiff has not proven its claim. The plaintiff's claim is hereby dismissed with costs to be taxed unless otherwise agreed.

Plaintiff's claims dismissed with costs to be taxed.

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Reported by Sally Kee

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